



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Kaufman Lasman Associates, Inc.

File: B-229917.9

Date: October 21, 1988

DIGEST

Where technical proposals submitted by the protester and incumbent contractor were considered to be substantially equivalent, contracting agency improperly made award to incumbent contractor having the higher evaluated price based on consideration of price-related factors not set out in solicitation where resulting price advantage to incumbent derived from prior improper contract award.

DECISION

Kaufman Lasman Associates, Inc., protests the Veterans Administration's (VA) award of a contract under request for proposals (RFP) No. 26/101/2 to Larry Latham Auctioneers, Inc. for auctioneering services in connection with sales of single family properties owned by VA. We sustain the protest.

The procurement by VA has been the subject of numerous protests to our Office. On December 10, 1987, VA made award under the RFP to Latham based on initial proposals. VA later determined that award on the basis of initial proposals was improper under the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. § 253b(d)(1)(B) (Supp. IV 1986). VA decided to hold discussions, request best and final offers (BAFOs) from all offerors in the competitive range and, if appropriate, terminate Latham's contract.

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We upheld VA's decision in Kaufman Lasman Associates, Inc., et al., B-229917, et al., Feb. 26, 1988, 88-1 CPD ¶ 202, aff'd on reconsideration, B-229917.3, Mar. 16, 1988, 88-1 CPD ¶ 271.1/ While the procurement was ongoing, however, VA allowed Latham to perform under the original award. It conducted a substantial number of auctions with sales volume exceeding \$25 million.

The RFP provided that proposals would be evaluated on the basis of technical considerations (worth 85 of 100 total points) and price (worth 15 points). With regard to price, the RFP required offerors to specify a percentage fee to be paid by VA based on two increments of property sales volume. The fee for the first increment would apply for all sales less than \$20 million in any calendar year, and the fee for the second increment would apply for all sales over \$20 million in any calendar year. The offeror in the competitive range with the lowest price would receive the entire 15 points. Other offerors within the competitive range would receive a percentage of the 15 points based on the proportional difference between their offers and the lowest priced offeror within the competitive range.

Seven offerors, including Kaufman and Latham, submitted BAFOs. With respect to the percentage fees, Latham proposed a 3.989 percentage fee for the first increment and a 1.989 percentage fee for the second increment. Kaufman proposed lower percentage fees for both increments. Overall, Kaufman's evaluated price was slightly less than Latham's evaluated price.^{2/} After applying the formula for determining the number of price points in the solicitation, Kaufman, because of its lower proposed price, received a slightly higher score than Latham. With regard to the technical considerations, Latham received the highest technical score, 78.91 of 85 total points; Kaufman received the second highest technical score, approximately one point below Latham's score. The contracting officer determined that in view of the slight difference in the scores, Kaufman's and

1/ The other protests concerning this procurement are not directly relevant to the issues raised in the current protest. See Federal Auction Service Corp., et al., B-229917.4, et al., June 10, 1988, 88-1 CPD ¶ 553, aff'd on reconsideration, B-229917.8, June 22, 1988, 88-1 CPD ¶ 597.

2/ The price difference between Kaufman and Latham is discussed only in general terms because Kaufman considers its BAFO prices to be confidential proprietary information.

Latham's technical proposals were substantially equivalent. When the price and technical points were combined, Latham received the highest combined total score, 89.11 points, and Kaufman received the second highest combined total score, 88.85 points.

In relevant part, section M of the solicitation provides as follows:

"The offeror with the highest combined point total (Maximum 100) and who has been determined to be responsible by the Contracting Officer will be awarded the contract. However, if VA finds offers in the highest end of the competitive range are essentially equal, the award may be made to an offeror receiving one of the highest total scores, (i.e., technical evaluation, plus price) which offers the lowest price."

While Kaufman's price was lower than Latham's based on the price evaluation formula in the RFP, the contracting officer concluded that awarding to Kaufman actually would be significantly more costly than allowing Latham to continue performing, due to the cost advantage derived from Latham's interim performance of the auction services while the procurement was ongoing. Specifically, because auction sales had already exceeded \$25 million under the Latham contract, if the award remained with Latham, the lower fee (1.989 percent) for the second increment of the pricing structure would apply. If, however, award was made to Kaufman, Kaufman's considerably higher fee for the first increment would apply. Furthermore, the VA contracting officer stated that a new award to Kaufman would impose an additional administrative burden on VA since VA personnel did not have any experience working with Kaufman. The VA contracting officer did not attribute a monetary amount relating to this administrative burden on VA personnel. The contracting officer then determined that award to Latham would result in the lowest price based on the additional expenses VA would incur if award were made to Kaufman. Accordingly, VA allowed the contract award to Latham to stand.

Kaufman alleges that it should have been awarded the contract and that VA abused its discretion by selecting Latham. The protester relies on the statement in section M of the RFP which provides that if VA finds offers in the highest end of the competitive range to be essentially equal, award may be made to an offeror receiving one of the highest total scores (i.e., technical evaluation plus price) which offers the lowest price. Because the agency report

establishes that VA found Kaufman's and Lathman's technical proposals to be "substantially equivalent," the protester alleges it was the proper awardee since its evaluated price was less than Lathman's evaluated price.

The protester further alleges that VA abused its discretion by evaluating the incumbent cost advantages associated with retaining the incumbent contractor because, first, the solicitation did not include these costs as evaluation factors, and second, the initial award to Latham, from which the cost advantage derived, was improper. We agree that the award decision should not have been based on the incumbent contractor cost factors.

It is a well-settled principle that offers must be evaluated on the basis stated in the RFP. Once offerors are informed of the criteria against which their proposals will be evaluated the agency must adhere to those criteria or inform all offerors of any changes made in the evaluation scheme. Everhart Appraisal Service Inc., B-231369, May 1, 1984, 84-1 CPD ¶ 485. Here, the solicitation listed marketing approach, relevant organizational capability and price as the evaluation criteria. The narrative describing each of the criteria did not indicate that the incumbent's cost advantage would be considered in evaluating the proposals. Therefore, with respect to price, it was reasonable for the parties to assume that only the evaluated price relating to the commission fees would be considered and that no other price-related factors such as incumbent cost advantage would be considered.

Moreover, the substantial cost savings which VA attributed to Latham resulted from Latham's interim performance of auction services after VA decided to proceed with negotiations. While the government need not ignore an incumbent's competitive advantage unless it is due to improper governmental action, see Diagnostic Equipment Services, B-228050.2, Dec. 3, 1987, 87-2 CPD ¶ 541, here, as VA itself determined, the initial award to Latham under which the interim services were performed was improper under CICA. As a result, in our view, it was improper for VA to rely on the price benefits resulting from the improper initial award in evaluating Latham's price under the RFP.

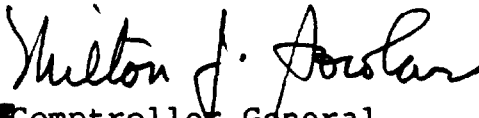
VA also argues that the award to Latham was proper because Latham received the highest combined point score. According to VA, despite the contracting officer's determination that Kaufman's and Latham's proposals were technically equivalent, VA was not required to make award on the basis of lowest price since the relevant language in the RFP--specifically, if proposals are found to be equal, award

"may" be made to the lowest priced offeror--is permissive rather than mandatory. We find this argument to be without merit. By finding that the two technical proposals were essentially equal, the contracting officer in effect concluded that the technical differences did not provide a basis for distinguishing between them. Under these circumstances, it was an abuse of discretion for VA not to make award on the basis of lowest price as calculated under the RFP. See SETAC, Inc., 62 Comp. Gen. 577 (1983), 83-2 CPD ¶ 121.

The protester also alleges that its technical proposal was evaluated improperly and that it should have received a higher technical score. In view of our conclusion that award should have been made to Kaufman, it is not necessary to address the specific allegations raised by the protester concerning its technical evaluation.

Given that the base period under Latham's contract expires in December, we do not believe it is appropriate to recommend termination of Latham's contract. We do recommend, however, that VA refrain from exercising any of the options under the contract and instead conduct a new procurement for its future needs. In addition, we find that since Kaufman in effect was induced to compete despite Latham's virtually determinative cost advantage, it is entitled to recover its proposal preparation costs and the costs of filing and pursuing the protest, including attorneys' fees. See Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1988); Thorn EMI Technology, Inc., B-228120, Jan. 15, 1988, 88-1 CPD 36.

The protest is sustained.


Acting Comptroller General
of the United States